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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

CELESTER RAYMOND DEGROAT, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether appellant Celester DeGroat's rights under the Fifth and Sixth Amendments were violated when he was extensively questioned under oath about his upcoming jury trial defenses by the Assistant United States Attorney and the District Court Judge without *Miranda* warnings, and without notice of the pretrial evidentiary session communicated to his attorney of record?

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INTRODUCTION

Mr. DeGroat was charged with the distribution of crack cocaine in the United States District Court for the Eastern District of Michigan. After a co-conspirator, Torrye Gilbert, entered a plea, Mr. Gilbert's counsel had the U.S. Marshals bring Mr. DeGroat to court so that Mr. DeGroat could testify at Mr. Gilbert's sentencing hearing. Mr. DeGroat was brought to the Gilbert sentencing hearing with no notice to his attorney of record. Mr. Gilbert's attorney had been previously advised by Mr. DeGroat's attorney that a Fifth Amendment objection would be interposed if a subpoena were to be served prior to Mr. DeGroat's upcoming conspiracy trial. No subpoena was ever served on Mr. DeGroat's attorney. In fact, a subpoena was not served on Mr. DeGroat until the US Marshals came to get him and brought him to court to testify.

Without a *Miranda* warning and without any reference made to Mr. DeGroat's right to consult with his attorney or to have his attorney present or that the statements he made could be used against him at his upcoming trial, Mr. DeGroat answered a few questions posed by Gilbert's defense attorney. The court then ruled that the assistant United States attorney could cross examine Mr. DeGroat on any issue relating to his relationship with the co-conspirator, Gilbert. Mr. DeGroat was extensively cross examined by the assistant United States Attorney about the specifics of his upcoming trial defenses. The court also engaged in questioning of Mr. DeGroat.

When Mr. DeGroat's attorney, William Street, learned of his client's trip to court and his testimony, he filed motions to dismiss the indictment against his client, to suppress the use of all of the testimony from Mr. DeGroat's trial and for the

judge to recuse himself. All of the motions were denied by the district court judge. A petition for a writ of mandamus was filed with the Sixth Circuit Court of Appeals. The petition was denied and Mr. DeGroat's case proceeded to trial.

Mr. DeGroat did not testify at his trial based on the court's refusal to suppress his testimony during Gilbert's sentencing hearing. Additionally, the prosecution called dozens of police officers in order to rebut Mr. DeGroat's primary defense – that drugs were planted by police officers. The government would not have known that this was Mr. DeGroat's primary defense had this information not been obtained during the cross examination of Mr. DeGroat at Gilbert's sentencing hearing.

Mr. DeGroat was convicted. He appealed his case on the same issues stated herein to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed Mr. DeGroat's conviction by rationalizing that **Miranda** only applies to custodial interrogation and that Mr. DeGroat had been read his rights upon arrest, thus he had been advised of his rights and must have elected to waive them voluntarily. The Sixth Circuit never addressed the **Massiah** violations present in this case, nor did it address the absolutely and completely egregious conduct on behalf of the district court, the government and defense counsel for the co-conspirator.

OPINION IN THE COURT BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the ruling of the district court is officially reported at ***United States v. DeGroat***, 2000 U.S. App. LEXIS 8063 (6th Cir. 2000), *reh. denied* (July 12, 2000.)

A copy of the opinion is attached as Appendix "A" and the denial of the petition for rehearing is attached as Appendix "B".

STATEMENT OF JURISDICTION

On April 20, 2000, the Sixth Circuit Court of Appeals entered judgment affirming the district court's conviction in this case. The Sixth Circuit Court of Appeal's order denying rehearing was entered on July 12, 2000. The district court had jurisdiction under 18 U.S.C. 3231. The Court of Appeals exercised jurisdiction under 28 U.S.C. 1294(1). This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

SUMMARY OF THE ARGUMENT

Mr. DeGroat's constitutional rights under the Fifth and Sixth Amendments were violated when he was brought to court and extensively questioned without the presence of counsel and without notification to his attorney of record. Furthermore, Mr. DeGroat was never informed that any statements he made at Gilbert's sentencing hearing could be used against him.

STATEMENT OF THE CASE

On October 1, 1996, an arrest warrant for Mr. DeGroat was issued by the United States District Court for the Eastern District of Michigan, Northern Division at Bay City. The warrant was based on a complaint charging Mr. DeGroat with distribution of crack cocaine in Saginaw,

Michigan. (R[1] 2, R 4.) Mr. DeGroat was arrested on October 2, 1996 and arraigned before United States Magistrate Judge Charles Binder the same day. Mr. DeGroat was placed in temporary detention and an attorney from the federal defender's office was appointed. (R 6, R 7.)

On January 27, 1997, attorney William Street was substituted for the federal defender. (R 22, R 19.) In February 1997, Mr. DeGroat's case was consolidated with a similar case. On February 18, 1997, Mr. DeGroat was arraigned on a superceding grand jury indictment alleging a conspiracy in which the co-defendants "organized themselves as a street gang in Saginaw, Michigan known as the '4KP' gang for the purpose of distributing cocaine in a certain geographical area." (R 23; 97-CR-2004, R 41-42.) Torrye Gilbert, an alleged co-conspirator, was also indicted for an August 1996 crack cocaine sale but was not formally charged as part of the conspiracy. (***United States v. Torrye Gilbert***, District Court # 96-CR-20045). Mr. Gilbert entered a Rule 11 plea. On July 15, 1997 Mr. Gilbert's attorney had Mr. DeGroat brought by the United States Marshal to the federal courthouse for the purpose of giving testimony at Mr. Gilbert's sentencing hearing.

At the July 15, 1997, sentencing hearing for Mr. Gilbert, assistant United States Attorney Hluchaniuk outlined the government's theory linking Mr. Gilbert to Mr. DeGroat through three witnesses, for the purpose of determining the proper drug quantities to calculate the federal sentencing guidelines. (AOB at 12.) After opening remarks the following occurred:

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1 R=Clerk's Record for case no. 96-CR-20046.

The Court: All right, sir, let's proceed.

Mr. Myers: Your Honor, while we're waiting, I wanted to mention to the court that I didn't subpoena Celester DeGroat, however, I did make arrangements with the marshal to bring him over this morning. We would ask after the government's witnesses are done that Celester be brought over.

The Court: Go ahead, Mr. Hluchaniuk.

After the government concluded its evidence the following exchange occurred:

The Court: Mr. Myers, are there any proofs you wish to present?

Mr. Myers: Yes, your Honor. I did subpoena Celester DeGroat, however, I did not have the marshals bring him over. I wanted to call Celester DeGroat just briefly.

The Court: You want to call him to testify though you know he has charges pending in this case?

Mr. Myers: Yes, and I have notified his counsel, Mr. Street.

The Court: Mr. Street. So you have spoken with Mr. Street about this?

Mr. Myers: Yes.

The Court: Mr. Street poses no objection to calling his client to the stand in advance of trial?

Mr. Myers: He said he would advise his client not to testify. He would recommend that his client not testify. Actually, I thought he was going to be here.

The Court: Have you spoken to the client?

Mr. Myers: Celester DeGroat. I did talk to him briefly at the jail.

The Court: Do you believe he's going to refuse to testify?
Mr. Myers: No.
The Court: Well then perhaps Mr. DeGroat should be brought over. Is there anything else you think I should inquire about, Mr. Hluchaniuk?
Mr. Hluchaniuk: Well, no, your Honor. I guess it was never
clear to me that Mr. DeGroat was going to testify. But if Mr. Myers says he has a good faith believe he will come here and testify, then I guess –
The Court: I think it's an extraordinary circumstance but, Mr. Myers, you proffer he's had a full discussion with Mr. Street and you as well with the proposed witness. How much time will be needed in order to bring him in, perhaps return and –
Marshall: A little more than half hour.
The Court: Why don't we recess til 11:30 and we'll see if we can get it accomplished and put the matter on hold until then. (Recess taken)
The Court: All right counsel, Mr. Myers, what do you wish to do?
Mr. Myers: Your honor, I wish to call Celester DeGroat.
The Court: Is this he?
Mr. Myers: Yes.
The Court: You've been called to the witness stand, sir, raise your right hand.

Celester DeGroat SWORN.

DIRECT EXAMINATION By Mr. Myers:

Q: Mr. DeGroat, I understand you're a defendant in the

proceedings presently pending before this court on cocaine conspiracy charges; is that true?

A: Yes, sir.

Q: You have not entered a plea yet, you're going to trial?

A: Yes, sir.

Q: You're represented by an attorney in that case?

A: Yes, sir.

Q: That Mr. Street?

A: Yes, sir.

Q: Do you understand I have had a subpoena served on you to testify in regard to Torrye Gilbert's sentence hearing?

A: Yes, sir.

Q: And you have had an opportunity to discuss that with your attorney, Mr. Street?

A: No, I haven't talked to him.

Q: Is it your understanding that he recommends you not testify?

A: I don't know.

Q: Do you understand you would have the right to remain silent and not testify, but if you wished to waive that right you can testify regarding your dealings or lack of dealings with Torrye Gilbert?

A: Yes.

Q: Do you wish to testify or not testify?

A: Yes.

Q: Yes, you wish to testify?

A: Yes, on behalf of Gilbert.

Q: Do you know a person by the name of Eugene Beaver?

A: I don't know him. I don't know him, I heard his name before.

Q: Well, we heard a person named Eugene Beaver testify this morning that he saw you front Torrye Gilbert

two ounces of crack cocaine and sell Torrye Gilbert two ounces of crack cocaine in February of 1993, is that true?

A: No, sir.

Q: Thank you. I have no further questions.

Mr. Hluchaniuk: Your Honor, perhaps some preliminary indication from the court on the scope of the cross examination would be appropriate. I believe that I am entitled to inquire of this witness anything relating to his involvement with the defendant, Mr. Beaver, or the general circumstances surrounding those events.

The Court: I think that's a fair recitation of proper scope, those matters were raised by Mr. Myers in his brief questioning.

CROSS EXAMINATION by Mr. Hluchaniuk

Q: Mr. DeGroat, were you selling drugs in Saginaw in 1993?

A: No, sir.

Q: Never sold any drugs at all?

A: No, sir.

Q: How about 1994?

A: I was in college, sir.

Q: Well, that doesn't mean you weren't selling drugs.

A: I was in school, I didn't have time to do anything else.

Q: So you were so busy in school you didn't have time to sell drugs?

A: Also I was on probation too.

Q: So the answer is no you weren't selling drugs in 1994?

A: '93, '94, '95, '96 and '97. I didn't sell any drugs, sir.
Q: All right. So in 1996 when there was a search conducted at your house and there were drugs found there, whose drugs were those?
A: I don't know, sir, I think one of the officers brought it in from my understanding.
Q: So the police planted the drugs in your house?
A: From what I understand. . .
(Appendix C, 96-CR-20045, p 41-46; emphasis added.)

At the close of the defense presentation the trial court made the following findings and comments:

> Well, the testimony of Celester DeGroat is not credible. It is contrary to the physical evidence, it's contrary to the 302 reports of multiple dozens, if not hundreds, of purchases of DeGroat. Contrary to – it stands in contradiction of every other scrap of testimony we have here save the defendant's, which I'll turn to in a few moments.
>
> I do not accept DeGroat's testimony as being credible. In fact, I think it was perjury in large measure; it was not particularly well done either. At great risk, it seems to me, if it were to find its way in front of the jury. But, of course, that will be his decision to make if the time comes.

(AOB at 18, 96-CR-20045, p 107-108.)

Mr. DeGroat's attorney was never notified, nor was he ever given notice of his client's testimony at Mr. Gilbert's sentencing hearing. Mr. Gilbert's attorney had been told by Mr. DeGroat's attorney that a Fifth Amendment objection would be interposed if a subpoena were to be served on Mr.

DeGroat prior to Mr. DeGroat's trial. (R 27; 97-CR-2004, R 105.) Mr. DeGroat was not *Mirandized* nor was he advised of his right to consult with or to contact his attorney. Instead he was extensively cross examined by assistant United States Attorney Michael Hluchaniuk and by Judge Cleland about his upcoming trial defenses. (***United States v. Gilbert***, 96-CR-20045, RT[2] 3-6, 41-61.)

Ten days later, Mr. DeGroat's trial attorney learned of the alleged subpoena, the July 15th sentencing hearing, and the testimony of his client, during a chance conversation with a defense attorney familiar with the case. (R 27.) Mr. DeGroat's trial attorney promptly procured a copy of the sentencing transcript and filed motions to recuse the judge based on violations of the Fifth and Sixth Amendment and Michigan Rules of Professional Conduct and Michigan Code of Judicial Conduct. (R 27.)

The trial judge issued a written opinion and order denying the disqualification motion. (R 30. 97-CR-2004) The order stated, "the court's decision not to instruct the witness on Miranda or his Constitutional rights was a judicial decision made during the course of a hearing which is rarely grounds for recusal." (R 30.)

On August 14, 1997, Mr. Street filed a motion to dismiss due to government misconduct at the sentencing hearing and an alternative motion to suppress Mr. DeGroat's prior testimony. (R 27, R 31, R 32.) Mr. Street requested a hearing to determine whether the "government disseminated particulars of defendant's testimony to police agents assigned

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2 RT=Reporter's Transcript.

to the conspiracy case and they, in turn, may have questioned any of a number of anticipated government trial witnesses about the specifics that were elicited from Mr. DeGroat." (R 31, R 32.) Mr. Street's affidavit noted that his client's testimony at the sentencing hearing, "severely damaged defendant's opportunity to present his trial defense to the jury, provided the government with significant tactical advantage in the presentation of their anticipated trial proofs, and may expose defendant Celester DeGroat to even more severe criminal penalties that those he already faces." (R 27.)

The government orally opposed Mr. Street's motions on the first day of trial. Mr. Hluchaniuk stated the government believed there had been no Constitutional violation or violation of the Michigan Rules of Professional Conduct at Mr. Gilbert's sentencing hearing. (RT Vol. I, p 20-21.) Mr. Hluchaniuk further stated:

> I don't think there was anything else that was unprofessional about what happened. This was something that took place in an open courtroom and not at the initiation of the government. It was one of the defendants, the co defendants, that initiated this matter. The defendant Celester DeGroat was brought to court and appeared to be willing to testify and did not invoke his right to counsel even though he was reminded of that right on the record.
>
> Certainly he had been advised of his Miranda warnings, although not at that hearing, when he was initially brought to court.
>
> Mr. DeGroat is an educated person, he's an intelligent person. It seems to me there is nothing

along the lines of a violation of the Rules of Professional Conduct to warrant any remedy that might be applied here.

I might add, your Honor, I do not anticipate using any of the defendant's testimony at that hearing in the government's case in chief, however that affects whatever ruling you might make in this matter. It would not – excuse me – it is not my intention to offer that as part of the evidence in the government's case in chief.

I don't know whether the defendant will testify in this trial if there is one. I'm not sure what the circumstances would be if he did in terms of potential impeachment, that sort of thing, but I don't intend on offering any of that evidence as part of the government's case in chief.

The Court: All right. Mr. Street?

Mr. Street: For the record, your Honor, I am genuinely and profoundly disappointed in Mr. Michael Hluchaniuk's statement that he does not see anything ethically suspect in what happened.

The Court: This situation has arisen before in this court, and it arises from time to time in other courts I'm aware . . .

(RT Vol. I, p 21-23.)

Mr. Street: In order to have a valid waiver you must first have a valid warning. While, indeed, attorney Myers appeared to be the only license professional in the room [at the Gilbert hearing] who at least gave part of a Miranda

warnings, he said you have a right to remain silent, but neither your Honor nor the assistant United States Attorney ever said a word about what you say might be used against you. That's what makes the warning a warning. Nor did either your Honor nor the assistant United States Attorney say anything about the right to confer with the lawyer, the right to have the questioning stopped at any time to confer with a lawyer just like a grand juror witness can.

And it is really grossly inaccurate to imply that we could have had a valid waiver of Miranda given the fact that we have, I would say, one part of the five of an actual Miranda warning that most police would carry on a card given in this case in this courtroom.

The Court: Thank you. Mr. Hluchaniuk, any comment?

Mr. Hluchaniuk: I guess I would disagree with the proposition that Miranda is even triggered by the circumstances under which the hearing took place. I don't believe the defendant was in custody within the meaning of Miranda, nor do I believe, based on the cases that I have cited in my response to the motion for recusal this was an interrogation within the meaning of Miranda.

An examination in the courtroom is not an interrogation as contemplated by Miranda, and the fact that the defendant appeared, even if he was in

> custody in the sense that he was detained by earlier order of the court, I don't think makes him in custody for purposes of Miranda.

(RT Vol. 1, p 32-33.)

The trial court denied the motion to dismiss. (RT Vol. 1, p 26.) The motion to suppress Mr. DeGroat's prior testimony was also denied. The trial court noted the government's express intention not to use the Gilbert information during its case in chief. The trial court further stated, "No prediction is made with regard to any possibility of use of any of those statements in a rebuttal case or in cross examination." (RT Vol. 1, p 26.) The trial court stated that the government's cross examination of Mr. DeGroat at the sentencing hearing did not violate the Sixth Amendment. (RT Vol. 1, p 38.) The trial court concluded:

> I find no indication here of a violation of the Fifth Amendment. I have, for the reasons states by the government in its brief, substantial doubt about whether the Miranda warning standards were, in fact, even necessary under the circumstances of the case.
>
> I find no basis to suggest that an evidentiary hearing should flow from this, but certainly rule that the avenues of cross examination that would otherwise be open to counsel for the defendant remain fully open and not restricted in any way by this decision to hold no preliminary pretrial evidentiary hearing. Those motions are disposed of.

(RT Vol. I, p 34.)

Mr. DeGroat filed a petition for a writ of mandamus to the Sixth Circuit Court of Appeals on August 15, 1997. Mr. DeGroat's petition for writ of mandamus was denied on August 28, 1997. (*In the matter of Celester DeGroat*, Sixth Circuit Court of Appeals #97-1875, p 2, R 36.)

Mr. DeGroat's trial commenced on August 18, 1997. During the testimony of an undercover officer the officer described an August 7, 1996 hand-to-hand drug transaction from Mr. Gilbert during which Mr. Gilbert allegedly was singing. (RT Vol. I, p 77-78.) Mr. Street objected that he had not received discovery of this alleged drug transaction. (*Id.*) The undercover officer's report, provided during a recess, made no reference to singing. Mr. Street argued that the officer's testimony demonstrated the government had adjusted it's case to exploit "the illegally obtained evidence from the July 15th interrogation session at the sentencing hearing of Mr. Torrye Gilbert." (RT Vol. I, p 82-86.) The government argued that the witnesses testimony was a surprise to them as well. (RT Vol. IV, p 86.) The court denied the request for a mistrial and declared that even if the government had been aware in advance of the agent's anticipated testimony about a singing drug deal, "I would not consider it improper behavior because it would not violate what Mr. Hluchaniuk had committed to do, to avoid – that is to use the testimony given by DeGroat in his case in chief." (RT Vol. IV, p 89.)

Mr. DeGroat's right to a fair trial was prejudiced when Mr. Street read a portion of an FBI report which revealed that the agent served a subpoena upon a government witness a day before jury selection began, questioning the witness about her familiarity with a rap much group and the 4KP street gang. (RT Vol. IV, p 82.) This issue was never addressed on the

record.

The government, over defense objection, was permitted to add to its witness list and call every single police officer present at the time of Mr. DeGroat's arrest and the execution of the search warrant for the express purpose of refuting "the implication" that crack cocaine found in the toilet had been planted. (RT Vol. III, p 108-110, 34-36.) Each of these additional witnesses denied planting evidence, or seeing anyone plant evidence during the execution of the search warrant. The government had learned of Mr. DeGroat's defense theory during his testimony at Mr. Gilbert's sentencing hearing. The trial court ruled that there was "utterly no basis to object" to this adjustment of the government's case-in-chief. (RT Vol. VIII, p 110.)

Mr. DeGroat did not testify at his trial based on the Sixth Circuit Court of Appeals ruling. On September 9, 1997, after two days of deliberations Mr. DeGroat was found guilty of all four counts in the indictment. (R 129.) On December 1, 1997, Mr. DeGroat was sentenced to 240 months for the charge of sale; 480 months for possession with intent to deliver; and 276 months for conspiracy. (R 37; 97-CR-2004, R 157.)

On December 22, 1997, Mr. DeGroat filed notices of appeal in the United States District Court for the Eastern District of Michigan in Bay City. Mr. DeGroat appealed his conviction to the Sixth District Court of Appeals. (R 38; 97-CR-2004, R 167.) Mr. DeGroat's appeal was denied on April 20, 2000. (***United States v. DeGroat***, 2000 U.S. App. LEXIS 8063, 6th Circuit.) The petition for rehearing was denied on July 12, 2000.

REASONS FOR GRANTING THE WRIT

This writ of certiorari should be granted because the United States Sixth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's supervisory power pursuant to Rule 10(a) of the Supreme Court of the United States.

I.
MASSIAH AND MIRANDA VIOLATIONS ARE CONSTITUTIONAL ISSUES

A person charged with a crime in a federal court is entitled to rights under the Fifth and Sixth Amendments to the United States Constitution. (**Johnson v. Zerbst,** 304 U.S. 458, 462 (1938).) **Miranda v. Arizona,** 384 US 436 (1966) is hornbook law, and now deeply entrenched social policy within the routine operation of the American criminal justice system. Although less well known to the general public, the special Sixth Amendment right to counsel protections afforded citizens who are formally charged with crimes are equally well established in the nation's legal framework. (**Massiah v. United States,** 377 US 201 (1964).

While differences of opinion do arise regarding the application of **Miranda** and **Massiah** to particular factual settings, the continued vitality of both cases' fundamental Fifth and Sixth Amendment doctrine is recognized by even the most "strict constructionist" contemporary Constitutional scholars. (**California v. Prysock,** 453 US 355 (1981); **Duckworth v. Eagan,** 492 US 195 (1989); **Maine v. Moulton,** 474 US 159 (1985); **Patterson v. Illinois,** 487 US 285 (1988); **McNeil v. Wisconsin,** 501 US 171 (1991).)

In Chief Justice Rehnquist's terminology, to "touch all of the bases required by **Miranda**" under the Fifth Amendment means telling a criminal suspect before interrogation that –

> . . . he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning, that he had 'this right to the advice and presence of a lawyer even if [he could] not afford one, and that he had the 'right to stop answering at any time until [he] talked to a lawyer.

(**Duckworth v. Eagan,** *supra,* 492 US at 203.)

Justice Scalia's opinion for the Supreme Court in **McNeil v. Wisconsin,** emphasized that Sixth Amendment guarantees were "offense specific," the express purpose being to "protect the unaided layman at critical confrontations" in a criminal prosecution from the inherent unfairness of meeting an "expert adversary" of the government without the aid of a lawyer. (**McNeil v. Wisconsin,** *supra,* 501 US at 175-76)(opinion joined by Chief Justice Rehnquist, and Justices White, O'Connor, Kennedy and Souter).) In a factual setting in which an assistant prosecuting attorney in conjunction with police personally did the questioning, the Supreme Court in **Patterson** defined the interplay between Fifth and Sixth Amendment safeguards this way:

> Whichever of these formulations is used, the key inquiry in a case such as this one must be: Was the accused, who waived his Sixth Amendment rights during postindictment questioning, made sufficiently aware of his

> right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel?

(**Patterson v. Illinois**, *supra*, 487 US at 292-293)(opinion of Justices White, Rehnquist, O'Connor, Scalia and Kennedy).)

Mr. DeGroat has a Fifth Amendment right to due process and a Fifth Amendment right against self-incrimination. "The Sixth Amendment guarantees that 'In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.' This is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty." (Id.) The Supreme Court in **Johnson v. Zerbst** further observed that:

> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." (*Citing to* **Palko v. Connecticut**, 302 U.S. 319, 325 (1937).) It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.

(**Johnson v. Zerbst**, *supra*, 304 U.S. at 462-63.)

In the instant case, Mr. DeGroat was denied the constitutional safeguards of both the Fifth and the Sixth Amendments. Various remedies sought at the trial level, including the recusal of the judge presiding over Mr.

DeGroat's trial, were denied. The petitioner was then unable to testify at his own trial because the statements he made in the absence of **Miranda** warnings and without the advice of counsel would have been used against him. As a result, the petitioner was denied a fair trial and specific due process rights.

II.
MR. DEGROAT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ALLOWED HIM TO TESTIFY IN THE ABSENCE OF HIS COUNSEL AND WITHOUT THE ADVICE OF COUNSEL

In **Massiah v. United States**, 377 US 201 (1964), the United States Supreme Court held that incriminating statements obtained by federal agents, prior to trial, from a defendant who was represented by counsel could not constitutionally be used against him. Where **Miranda** seeks to protect a suspect's privilege against self-incrimination from compulsion and interrogation in a custodial setting, **Massiah** is expressly designed to counter deliberate interference with an indicted suspect's right to counsel. "By focusing on deliberateness, **Massiah** imposes the exclusionary sanction on that conduct that is most culpable, most likely to frustrate the purpose of having counsel, and most susceptible to being checked by a deterrent." (**United States v. Henry**, 447 US 264 (1980), *dissent*, J. Blackman and J. White; *cf* **Brown v. Illinois**, 422 US 590, 604 (1975).)

The Sixth Circuit Court of Appeals, in its opinion, did not ever reach the issue of **Massiah** because it was quick to denounce that Mr. DeGroat was not entitled to the protections of **Miranda** as the facts did not indicate that there

was custodial interrogation. The petitioner submits that the Sixth Circuit ruling was in error in that both his Fifth and Sixth Amendment rights under **Miranda** and **Massiah** were violated.

The Supreme Court has held that once formal proceedings have commenced, an accused has a Sixth Amendment right to counsel at "critical stages" of the criminal proceedings. In **Powell v. Alabama**, 287 US 45 (1932), the Court held that the critical period was "from the time of [the defendant's] arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important." (**Id.** at 47.)

In **Patterson v. Illinois**, 487 US 285 (1988), the Supreme Court explained that:

> At one end of the spectrum, we have concluded that there is no Sixth Amendment right to counsel whatsoever at a postindictment photographic display identification, because this procedure is not one at which the accused "require[s] aid in coping with legal problems or assistance in meeting his adversary." See *United States v. Ash*, 413 US 300, 313-320 (1973). At the other extreme, recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial. See *Faretta v. California*, 422 US 806,

> 835-36 (1975); cf. *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948). In these extreme cases, and in others that fall between these two poles, we have defined the scope of the right to counsel by pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.

(**Patterson v. Illinois**, *supra*, 487 US at 298.)

In **United States v. Gouveia**, 467 US 180 (1984), the Supreme Court explained the importance of having counsel present at all times during the adversarial process of criminal proceedings:

> The purpose of the Sixth Amendment counsel guarantee – and hence the purpose of invoking it – is to "protect the unaided layman at critical confrontations" with his "expert adversary," the government, *after* "the adverse positions of government and defendant have solidified" with respect to a particular alleged crime.

(**United States v. Gouveia**, *supra*, 467 US at 189.)

Similarly, in **Brewer v. Williams**, 430 US 387 (1977), the Supreme Court reiterated the importance of the assistance of counsel from the time of arraignment through the trial itself. (Id. at 398.) The Court also observed that:

> There has occasionally been a difference of opinion within the Court as to the peripheral

> scope of this constitutional right. See *Kirby v. Illinois*, 406 US 682; *Coleman v. Alabama*, 399 US 1. But its basic contours, which are identical in state and federal contexts, *Gideon v. Wainwright*, 372 US 335; *Argersinger v. Hamlin*, 407 US 25, are too well established to require extensive elaboration here. Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him – "whether by way of formal information, or arraignment." *Kirby v. Illinois*,, *supra*, at 689. See *Powell v. Alabama*, *supra*; *Johnson v. Zerbst*, 304 US 458; *Hamilton v. Alabama*, 368 US 52; *Gideon v. Wainwright*, *supra*; *White v. Maryland*, 373 US 59; *Massiah v. United States*, 377 US 201; *United States v. Wade*, 388 US 218; *Gilbert v. California*, 388 US 263; *Coleman v. Alabama*, *supra*. . . . . [T]he clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.

(**Brewer v. Williams**, *supra*, 430 US at 398, 401.)

In **Maine v. Moulton**, 474 US 159 (1985), the Supreme Court concluded that while the Sixth Amendment is not violated whenever the state obtains incriminating information from a defendant, "knowing exploitation by the State of an opportunity to confront the accused without counsel being present is ... a breach of the State's obligation not to circumvent the right to counsel." (Id. at 176.)

In this case, Mr. DeGroat's status as a layman and the knowing exploitation of his lack of legal expertise are staggering. Mr. DeGroat's attorney would have advised him not to testify and this was communicated to Gilbert's attorney. The damage that resulted from Mr. DeGroat's testimony is exactly why his attorney would have advised him not to testify. Both Gilbert's attorney and the assistant United States attorney engaged in conduct so egregious it staggers the mind. That the district court permitted it is even more staggering.

The State of Michigan has adopted the ethical cannons of the Model Code of Professional Responsibility. Under the Code of Federal Regulations, Title 28, section 77 et seq., and under 28 USC 530B (adopted April 1999), attorneys for the government are required to conform their conduct and activities to the state rules and laws of the state in which they are situated. In **People v. Green**, 405 Mich. 273 (1979), the Michigan Supreme Court noted that "The state has conceded ..... that prosecuting attorneys are not exempt from the strictures of DR 7-104(A)(1)." (Id. at 290-91.) DR 7-104(A)(1) of the Model Code of Professional Responsibility, states that:

> During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

It is clear that neither Gilbert's attorney, nor the prosecuting attorney for the government should have engaged in any conversation with Mr. DeGroat without the express consent from his attorney. When Mr. DeGroat stated, on the record, that he had not spoken to his attorney about giving testimony at Gilbert's sentencing hearing, all questioning should have stopped. Telling Mr. DeGroat that he could have his attorney there if he wanted was insufficient. Mr. DeGroat was not advised that his statements could be used against him, nor did he possess the legal skill and knowledge to understand the ramifications of his testimony. That is precisely why criminal defendants are protected by counsel, so that their due process rights under the constitution will not be unwittingly abrogated by those possessing a higher level of skill and legal knowledge.

III.
MR. DEGROAT SHOULD HAVE BEEN GIVEN MIRANDA WARNINGS PRIOR TO HIS TESTIMONY AT THE GILBERT SENTENCING HEARING

In **Miranda v. Arizona,** 384 US 436 (1966), the Supreme Court held as follows:

> The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived

> of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

(**Miranda v. Arizona**, *supra*, 384 US at 444, emphasis supplied.) The decision in **Miranda** was recently affirmed in **Dickerson v. United States**, 120 S.Ct. 2326 (June 26, 2000).

In this case, it is undisputed that the petitioner was in custody awaiting his own trial which was to be prosecuted by the same prosecutor in front of the same judge. Mr. DeGroat argued on numerous occasions that the use of his testimony at Gilbert's sentencing hearing in any manner violated his Fifth and Sixth Amendment rights to a fair trial. The Sixth Circuit Court of Appeals, in its opinion wrote:

> Initially, it should be noted that this claim is not accurately stated as a violation of the defendant's *Miranda* rights. *Miranda* applies only to custodial interrogations. *See United States v. Meyers*, 123 F.3d 350, 359 (6th Cir. 1997). In *Myers*, this Circuit reviewed the relevant Supreme Court case law and noted that the circuits that had addressed the issue

> were reluctant to require *Miranda*- like warnings before taking grand jury testimony of suspects. Id. at 359-60..... The situation in this case differs slightly from *Myers*; however, we believe that no *Miranda* violation occurred in this case either. Although the defendant was not specifically informed in the courtroom of the fact that his testimony could be used against him, he had received *Miranda* warnings upon his arrest for the charges involved in this case.

(**United States v. DeGroat**, 2000 US App Lexis at *22-23.)

Essentially, the Sixth Circuit rationalizes the antics of the co-conspirator's defense counsel, the assistant United States Attorney and the Judge by implying that Mr. DeGroat's testimony was not the product of custodial interrogation. First, Mr. DeGroat was clearly in custody and his liberty was restrained. Secondly, although Mr. Meyer's brief questioning may not have risen to the level of interrogation, the ensuing questions from the prosecutor and the court certainly were. For example, Mr. DeGroat was questioned about his defenses to his upcoming trial. There is no question that he was in custody and there was no question that the line of questioning posed to him by the prosecutor and the court amounted to interrogation.

The Sixth Circuit then argues that a trial judge has no duty to advise a defendant of his **Miranda** rights in a courtroom because the Sixth Circuit held in **Myers** that a suspect is not entitled to *Miranda* - like warnings when called to testify before a grand jury. (*See* **United States v. Meyers**, 123 F.3d 350, 359 (6th Cir. 1997).) In **Meyers**, the defendant was not in custody, he had not been indicted and it was

debatable as to whether or not he was a suspect or a target when he was called to the grand jury to testify. That case is in no way similar to the case at bar. Here, Mr. DeGroat was in custody, he had been indicted and he was called before the same prosecutor and judge who was to preside over his upcoming trial.

The Sixth Circuit then went on to say that Mr. DeGroat had been advised of his constitutional rights under **Miranda** upon his arrest, ten months prior to his testimony at Gilbert's sentencing hearing. The court, and the government, at the very least, had a duty to inform Mr. DeGroat that any statements he made could be used against him. The setting was custodial and the cross-examination by the government amounted to interrogation. One cannot conclude that Mr. DeGroat voluntarily waived his rights because he was never informed that his statements could be used against him. It is well established that once a defendant is represented by counsel, government agents may not reinitiate conversation or interrogation of any sort without a knowing, voluntary and intelligent waiver of the defendant's rights. The government is never entitled to question a suspect or defendant who is in custody, about another crime, other than that for which he is being held, without issuing a new **Miranda** warning. (**Miranda,** supra.) Those facts are not present in this case and the Sixth Circuit Court of Appeals erred when it affirmed Mr. DeGroat's conviction.

CONCLUSION

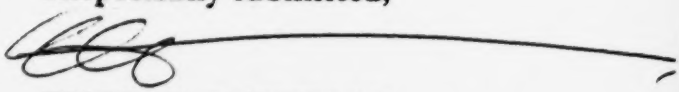
It is frightening to think that the Sixth Circuit Court of Appeals thinks so little of Mr. DeGroat's constitutional rights. The constitutional rights at issue under both **Miranda** and **Massiah** are well entrenched in our criminal justice

system. An attorney may never have contact with a represented party without permission from his counsel. In this case, Mr. DeGroat's attorney made it very clear that he would advise his client to assert his Fifth Amendment rights were a subpoena issued. Mr. DeGroat told the court that he had not spoken to his attorney about testifying. All questioning of Mr. DeGroat should have ceased at that time.

When Mr. DeGroat's attorney learned of the testimony, he brought the proper motions before the court requesting either dismissal of the indictment or suppression of the testimony at Mr. DeGroat's trial and he also requested that the judge recuse himself. None of the motions were granted. The Sixth Circuit did not grant Mr. DeGroat relief when he filed a petition for writ of mandamus, nor did it grant him relief on appeal.

Mr. DeGroat's constitutional rights under the Fifth and Sixth Amendments to the United States Constitution were violated in such a horrific manner that he could not possibly have received a fair trial. Accordingly, the petitioner respectfully requests that this Court grant his petition for a writ of certiorari to review the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,



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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Filed April 20, 2000

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Nos. 97-2224
	)	97-2248
v.	)	97-2270
	)	97-2343
DANTE ANTOINE BEAVER,	)	97-2344
LEMONT NASH, DEMONT	)	98-1012
NASH, ANDRE LAMONT	)	98-1015
PRUITT, CELESTER RAYMOND	)	98-1076
DEGROAT, DENISE DEGROAT,	)	98-1155
VENNIS DELON LILES,	)	
	)	
Defendants-Appellants.	)	
	)	

Appeal from the United States District Court
for the Eastern District of Michigan
Judge Cleland, United States District Judge

Filed
April 20, 2000

Before: MERRITT, KENNEDY and SILER, Circuit Judges. MERRITT, Circuit Judge, concurring in part and dissenting in part.

OPINION BY: KENNEDY

OPINION: KENNEDY, Circuit Judge. This appeal arises

from the convictions of seven defendants for their involvement in a drug conspiracy in Saginaw, Michigan. One defendant, Celester Degroat brings claims arising out of his jury conviction and two defendants, Andre Pruitt and Denise Degroat, bring claims arising out of their jury convictions and sentences. In addition, four defendants, Demont Nash, Lemont Nash, Vennis Liles, and Dante Beaver, appeal the sentences[*3] imposed after they entered guilty pleas. Although the defendants raise numerous claims of error, we find that only one – defendant Denise Degroat's claim of error arising out of her conviction under 18 U.S.C. § 2232 – is meritorious. For this reason we AFFIRM the district court in part, and REVERSE in part.

I. FACTS

On January 15, 1997, a grand jury returned an indictment in which the defendants [1] were charged with conspiracy to distribute crack cocaine and possession with intent to distribute crack cocaine. Four defendants pled guilty to count two of the indictment, possession with intent to distribute, while three defendants proceeded to trial.

Prior to trial, defendant Celester Degroat testified at the sentencing[*4] hearing of an unindicted co-conspirator. He was subpoenaed by the co-conspirator's attorney and appeared before the court without obtaining the advice of his attorney

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1. On January 29, 1997 defendants were charged in a superseding indictment which added defendant Denise Degroat to the conspiracy charge. In this indictment defendant Denise Degroat also was charged with two violations of 18 U.S.C. § 2232(b).

about the matter. The co-conspirator's attorney told the defendant he had the right not to testify, but he did not inform the defendant that his testimony could be used against him. The prosecuting attorney and the trial judge, both scheduled to participate in defendant's trial, did not advise the defendant of his right not to incriminate himself. Defendant was cross-examined by the prosecuting attorney on numerous aspects of his role in the conspiracy. Upon learning of this testimony, defendant's counsel requested that the indictment be dismissed on grounds that his client's Fifth and Sixth Amendment rights had been violated. This request was denied, as was his request for an evidentiary hearing, his motion to recuse the judge, and his motion to suppress the use of any evidence obtained from this testimony.

At trial, the prosecution presented the testimony of Eugene Beaver. Witness Beaver described his involvement with the defendants. He stated that in 1993 he purchased nine ounces of cocaine for defendant Celester[*5] Degroat and transported it to Saginaw, Michigan from California. Beaver and Degroat went to the Nash residence and Beaver watched Degroat distribute the cocaine to several individuals, including defendants Demont and Lemont Nash and Andre Pruitt. Beaver indicated that he continued to supply defendant Degroat and his gang, except for a lapse of approximately six months, throughout the time-frame of the conspiracy. Beaver's testimony, though not always consistent in every particular detail, described in great detail the operations of this organization.

The prosecution also introduced the testimony of numerous other witnesses, including government informants and undercover officers. The testimony revealed the existence of the 4-KP gang who controlled the drug trade on the streets

of Fourth and Kirk in Saginaw, Michigan. Witnesses testified to numerous sales of drugs by the defendants and to the existence of weapons throughout the area to protect the members. Additional evidence demonstrated that defendant Denise Degroat, a Saginaw police officer, provided members of the gang with information about investigations of their activities and offered to assist the members on occasion. In particular, [*6] Officer Leatherman testified that DeGroat recognized Leatherman at the Saginaw police station and later warned Alfreda Brewer not to engage in a drug transaction with Leatherman by shouting "Don't Freida girl. No. No. No. No. No. No, Frieda girl." Brewer ran away and did not complete the transaction.

The jury convicted defendants Pruitt and Celester Degroat for violations of 21 U.S.C. §§ 841(a)(1) and 846. Defendant Denise Degroat was convicted of a violation of 21 U.S.C. § 846 and for obstructing a search under 18 U.S.C. § 2232 (b). All defendants appeared before the trial judge for sentencing. The four defendants who pled guilty appeal their sentences, while the three defendants who proceeded to trial appeal their convictions and Pruitt and Denise DeGroat appeal their sentences.

II. DISCUSSION

On this appeal, six defendants challenge the district court's factual findings as to their sentences. [2] In addition, defendants Denise Degroat and Pruitt challenge their convictions under 21 U.S.C. § 846 on grounds of insufficient

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2. Celester DeGroat did not appeal his sentence.

evidence. Defendants Celester Degroat and Pruitt contend that[*7] the prosecutor violated 18 U.S.C. § 201(c)(2) when he introduced the testimony of co-conspirators. They also contend that the district court erred in making numerous evidentiary decisions. These three defendants also bring individual claims of error in the trial proceedings. Defendant Pruitt raises two claims: (1) whether the jury pool violated United States v. Ovalle, 136 F.3d 1092 (6th Cir.1998) and (2) whether his trial should have been severed from the other defendants.[3] Defendant Denise Degroat raises two claims: (1) whether there was sufficient evidence to support her conviction under 18 U.S.C. § 2232(b) and (2) whether the trial judge's bias made the trial fundamentally unfair. Defendant Celester Degroat raises one claim: (1) whether his Fifth and Sixth Amendment rights were violated due to his testimony at a co-conspirator's sentencing hearing. We address each of the defendants' claims below. [*8]

1. Motion to Sever

Defendant Pruitt argues that the district court erred in

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3. Defendant Pruitt also attempts to incorporate the claims of the other defendants in his appeal. Fed. R. App. P. 28(i) states: "In cases involving more than one appellant or appellee, . . . any appellant or appellee may adopt by reference any part of the brief of another." There is a limit to this rule in that only those arguments that are readily transferable from one appellant's case to another's are permissible. See United States v. Elder, 90 F.3d 1110, 1118 (6th Cir. 1996). Thus, defendant Pruitt's incorporation is construed only to encompass those claims of the other defendants that are not fact-specific.

denying his motion to sever. He contends that he was prejudiced by the joinder of his trial with Denise and Celester Degroat because his role in the offense was minimal compared to his co-defendants. Rule 8(b) of the Federal Rules of Criminal Procedure makes joinder in this case permissible, while Rule 14 permits severance if one of the defendants is prejudiced by a joint trial. "There is a preference for joint trials of defendants who are indicted together." United States v. Odom, 13 F.3d 949, 958 (6th Cir. 1994). In Zafiro v. United States, 506 U.S. 534, 539, 113 S. Ct. 933, 938, 122 L. Ed. 2d 317 (1993), the Supreme Court held that if defendants are properly joined, a judge should grant a severance "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." This court reviews the district court's decision to deny the severance motion for abuse of discretion. See Odum, 13 F.3d at 958.

We find that the defendant has[*9] procedurally defaulted this claim because he did not preserve it for appeal. He did not raise this issue in the district court, thus, he has waived the issue.[4] See United States v. Ghazaleh, 58 F.3d

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4. Prior to being charged in the indictment in this case, defendant Pruitt was charged in a separate indictment for one count of distribution of cocaine and one count of attempted distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). The defendant filed a motion to sever for trial on this indictment. The court denied this motion as moot because no other defendants were scheduled to be tried with the defendant. When the defendant was joined with the co-defendants in the new indictment and charged with

240, 243 (6th Cir. 1995). In addition, we believe that this claim can be denied on the merits. The defendant does not identify a specific right that was violated by the court's refusal to grant his severance motion, rather he claims that his general right to a fair trial was violated. He contends that the introduction of evidence of his co-defendants' actions prejudiced his defense. Even if the defendant's trial had been severed, the evidence of which he complains would have been admissible at his trial. The evidence introduced at trial was necessary to establish the existence of the conspiracy, one of the elements of the charged offense; thus, the defendant has not demonstrated prejudice. [*10]

2. Ovalle Claim

Defendant Pruitt raises an Ovalle claim asking this court to reverse his conviction due to an improper jury pool. In support of his claim, the defendant offers only the fact that this Circuit ruled in United States v. Ovalle, 136 F.3d 1092, 1107 (6th Cir. 1998), that the Eastern District of Michigan's jury pool was improperly selected based on race. He states that because his trial occurred while the Eastern District used improper jury pools he is entitled to relief. The defendant has defaulted his Ovalle claim because he did not raise an objection to the jury venire prior to jury selection. Failure to raise an objection to the selection of the grand or petit jury prior to trial "shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." Fed. R. Crim. P. 12(f); see also United States v. Oldfield, 859 F.2d 392, 396 (6th Cir.1988). This court has held previously that

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conspiracy, he failed to raise the severance issue.

relief from Rule 12(b)(2) requirements is appropriate only where the district court has made a finding of "cause and actual prejudice." Id. at 397. In his brief submitted to this court, defendant does not[*11] provide any evidence that establishes either "cause" or "prejudice." Without the presentation of this type of evidence, there is no basis to grant the defendant's requested relief.

3. 21 U.S.C. § 846

Defendants Pruitt and Denise Degroat appeal their convictions under 21 U.S.C. § 846 on the grounds that there was insufficient evidence to support their convictions. This court reviews challenges to the sufficiency of the evidence to determine "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Avery, 128 F.3d 966, 971 (6th Cir. 1997). The defendants must satisfy a heavy burden to establish insufficiency of the evidence. See United States v. Vannerson, 786 F.2d 221, 225 (6th Cir. 1986). We find that the defendants fail to satisfy this burden.

To show that a defendant has violated 21 U.S.C. § 846, the prosecutor "must prove (1) an agreement to violate drug laws; (2) knowledge and intent to join the conspiracy; and (3) participation[*12] in the conspiracy." United States v. Layne, 192 F.3d 556, 567 (6th Cir. 1999). The evidence adduced at trial of the existence of a conspiracy was significant. Witnesses Beaver and Irvin testified that the 4-KP gang was an organization that distributed drugs on the streets of Fourth and Kirk in Saginaw. These witnesses testified to the numerous sales of drugs they witnessed. Beaver also testified to witnessing the distribution of drugs he provided to

defendant Celester Degroat among the numerous individuals involved in the conspiracy. Further testimony was provided by the police officers involved in uncovering the conspiracy. Viewing all of this evidence in the light most favorable to the prosecution, we believe that there was abundant evidence of a conspiracy.

Finding that there was sufficient evidence of a conspiracy introduced at trial, this court must then determine whether there was sufficient evidence of the defendants' participation in the conspiracy. The prosecution is not required to prove that the defendants participated in every part of the conspiracy. Instead, a jury can convict the defendants on a finding of only a slight connection if that finding is[*13] supported by sufficient evidence to prove that connection beyond a reasonable doubt. See United States v. Ward, 190 F.3d 483, 488 (6th Cir. 1998). We find that the evidence introduced at trial establishes that both defendants had, at the very least, a slight connection to the conspiracy and that the connection was proved beyond a reasonable doubt.

At trial, there was no evidence introduced that established that defendant Denise Degroat ever possessed or distributed cocaine; however, evidence was introduced that demonstrated that the defendant was aware of the existence of the conspiracy and that she attempted to prevent the conspiracy from being discovered. Acting to assist a conspiracy further its goals is a sufficient connection to the conspiracy to support a conviction under 21 U.S.C. § 846. See Odom, 13 F.3d at 959. Witness Beaver testified that the defendant warned defendant Celester Degroat that the house from which he was distributing drugs was under surveillance. Undercover officer Leatherman testified that the defendant warned another co-conspirator not to sell to the officer after

the defendant had seen the officer[*14] at the police station. Witness Irvin testified that the defendant, a Saginaw police officer, had done nothing when drugs were in her presence. He also stated that the defendant asked him not to press charges against her cousin and that, in exchange, she would use her job as a Saginaw police officer to assist him. Additional testimony also linked her to the conspiracy. This evidence is sufficient to support her conviction.

Although the amount of evidence introduced at trial connecting defendant Pruitt to the conspiracy was not as great as the evidence introduced against his co-defendants, it was still significant. Beaver testified that Pruitt was present when the first shipment of drugs from California were distributed by defendant Celester Degroat. Witness Foote testified that she had purchased drugs from Pruitt over one hundred times in the location where the 4-KP gang was known to sell drugs. Other witnesses also testified to seeing Pruitt in the location on numerous occasions. Based on this evidence, we believe that a reasonable trier of fact could find that the defendant had knowledge of the conspiracy and was a willing participant.

4. 18 U.S.C. § 2232 (b) [*15]

Defendant Denise Degroat contends that the trial court erred in denying her rule 29 motion to acquit on grounds of insufficient evidence to support a conviction under 18 U.S.C. § 2232(b). Because the defendant did not renew her motion at the end of the government's rebuttal case the government argues that she has not properly preserved this issue for appeal. See United States v. Williams, 940 F.2d 176, 180 (6th Cir. 1991) (holding that defendants must renew their motion for acquittal at the close of all the evidence or it will be

deemed waived). We find that the defendant did waive her objection, so this court will review her conviction for plain error and can reverse only if there is a "manifest miscarriage of justice." United States v. Price, 134 F.3d 340, 350 (6th Cir. 1998). Defendant's argues that her conviction should be reversed because the government did not prove that a search or seizure of Alfreda Brewer was imminent when she warned Brewer not to sell to undercover officers. We, however, believe that her conviction should be reversed because the trial court's instructions to the jury on this count were erroneous. [*16] While the defendant failed to object to the instruction in the district court and did not raise the erroneous instruction on appeal, we have discretion to act upon plain error if the error affects substantial rights and we believe that it would be a manifest injustice if the error is not corrected. United States v. Hoglund, 178 F.3d 410, 412 (6th Cir. 1999). We believe that the district court's instructions on this count constitute plain error requiring reversal.

Section 2232(b) provides:

> whoever, having knowledge that any person authorized to make searches and seizures has been authorized or is otherwise likely to make a search or seizure, in order to prevent the authorized seizing or securing of any person, goods, wares, merchandise or other property, gives notice or attempts to give notice of the possible search or seizure to any person shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2232(b) (West 1984 & Supp.1999). The trial judge instructed the jury that "an undercover purchase or intended

undercover purchase of cocaine base by an officer with or without the help of a civilian[*17] informant, is a seizure of that drug." This instruction is contrary to the Supreme Court's holding in Maryland v. Macon, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985). The Court held that the voluntary transfer of a possessory interest in a good is not a seizure because a seizure requires an "interference with an individual's possessory interests in the property seized." Id. at 469, 105 S. Ct. at 2782. The trial court's erroneous instruction allowed the jury to find defendant guilty of violating this statute if they found that she had prevented the sale of drugs. Because this is not a permissible basis upon which to convict the defendant of interfering with a search or seizure we reverse the conviction on this count of the indictment. We, however, do not believe that the defendant is entitled to the entry of a judgment of acquittal on this count because we cannot say that the evidence presented at trial would not support a conviction. For this reason, we remand this count to the district court for a new trial.

5. Judicial Bias

Defendant Denise Degroat contends that she was denied her right to a fair trial due to the bias of the district[*18] court judge. We find that this argument fails because the defendant's claim is based solely on evidentiary and judicial rulings made by the trial judge. Defendant alleges that the judge demonstrated his bias by allowing the introduction of certain evidence that the defendant identifies as prejudicial and irrelevant. She also proffers the judge's favorable treatment of the prosecuting attorney and contrasts it with the judge's unfavorable treatment of the defense attorneys. Lastly, she accuses the judge of engaging in improper questioning of witnesses, oftentimes acting as a prosecuting attorney. After

a review of these alleged incidences of judicial bias, we find that no one single act constitutes impermissible action on the part of the judge and that the combination of all these permissible actions also does not establish any judicial bias.

In Liteky v. United States, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994), the Supreme Court set forth the standard for assessing whether judicial bias has prevented the defendant from receiving a fair trial. The Court noted that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion, [*19] " nor do "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases." Id. at 555, 114 S. Ct. at 1157. Because all of the defendant's allegations of bias fall into either the category of judicial rulings or judicial remarks the defendant has not demonstrated that judicial bias existed making a fair trial an impossibility.

Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – remain immune. Id. at 555-56, 114 S. Ct. at 1157. We believe that, rather than constituting inappropriate behavior, the district court judge's actions were justified as "ordinary efforts at courtroom administration." Finding that the defendant's trial was not infected by judicial bias, we deny the defendant's claim.

6. Fifth and Sixth Amendment [*20] Violations

Defendant Celester Degroat appeals his conviction on the grounds that it was obtained in violation of his Fifth and Sixth Amendment rights to a fair trial. Prior to the commencement of his trial, defendant was subpoenaed to testify at the sentencing hearing of a co-conspirator. The co-conspirator's attorney who issued the subpoena advised the court that he had spoken with the defendant's attorney and was informed that the defendant's attorney would recommend that the defendant exercise his Fifth Amendment rights not to testify if the co-conspirator called him to the stand. Because the defendant's attorney had not spoken with his client, he asked the co-conspirator's attorney to adjourn the sentencing hearing. The hearing was adjourned as requested and rescheduled. Although the co-conspirator's attorney stated at the sentencing hearing that he attempted to inform the defendant's attorney of the new date for the sentencing hearing, he admitted that he never spoke directly to the attorney with respect to the date. At the sentencing hearing the defendant was called to the stand and was asked whether he had spoken with his attorney. The defendant stated that he had not, but[*21] that he was willing to testify. The co-conspirator's attorney advised the defendant that he had the right not to testify, but he did not inform him as to the consequences of his testifying – i.e, that anything he testified to could be used against him.[5] The defendant testified

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5. Q: Do you understand you would have the right to remain silent and not testify, but if you wished to waive that right you can testify regarding your dealings or lack of dealings with Torrye Gilbert?
A: Yes.
Q: Do you wish to testify or not testify?
A: Yes.

and was cross- examined by the assistant United States attorney who was conducting the trial against the defendant. The defendant's testimony was heard by the judge who was hearing the defendant's case.

Upon learning that the defendant had testified at the sentencing hearing, the defendant's attorney filed motions requesting that the trial judge recuse himself from the defendant's case, that an evidentiary[*22] hearing be held to determine what information the prosecution had obtained from the defendant's testimony, and that the prosecution be prohibited from using any information obtained from the defendant's testimony at the defendant's trial. All of these requests were denied by the trial judge, although the prosecuting attorney indicated that he had no intention of using any information obtained in his case-in-chief. Defendant argues that the use of this information in any manner constitutes a violation of his Fifth and Sixth Amendment rights to a fair trial.

Initially, it should be noted that this claim is not accurately stated as a violation of the defendant's Miranda rights. Miranda applies only to custodial interrogations. See United States v. Myers, 123 F.3d 350, 359 (6th Cir. 1997). In Myers, this Circuit reviewed the relevant Supreme Court case law and noted that the circuits that had addressed the issue were reluctant to require Miranda -like warnings before taking grand jury testimony of suspects. Id. at 359-60. Finding that the suspect had received adequate notice of his right not to incriminate himself, the court found no [*23]

Q: Yes, you wish to testify?
A: Yes, on behalf of Gilbert.

Miranda violation. The situation in this case differs slightly from Myers; however, we believe that no Miranda violation occurred in this case either. Although the defendant was not specifically informed in the courtroom of the fact that his testimony could be used against him, he had received Miranda warnings upon his arrest for the charges involved in this case. He, unlike an individual who is just a suspect, had specific knowledge of the government's interest in his testimony. Because the Sixth Circuit has not required that witnesses be given Miranda-like warnings prior to their testimony the trial court is required only to assess the voluntariness of the defendant's waiver of his rights, whether it was made in a knowing and intelligent manner. See Johnson v. Zerbst, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938). We find that the trial court made a correct determination that the defendant voluntarily waived his rights.

Defendant was an educated man[6] who had been informed of his Fifth Amendment rights when he was arrested. He had obtained an attorney and had spoken with him, although not about this particular matter, prior to[*24] taking the stand to testify. His statements in the courtroom prior to his testimony indicate that he understood what he was doing. The trial judge was aware of all these factors when he made his determination and also had the benefit of assessing the defendant's willingness to testify firsthand. In light of these circumstances, we believe the district court did not err in finding that the defendant voluntarily waived his

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6. In his cross-examination at the Torrye Gilbert sentencing hearing and at trial, defendant presented himself as a college student.

rights prior to testifying at the sentencing hearing.

Defendant also contends that the court's failure to warn him of the implications of his testimony violated his Sixth Amendment right to a fair trial. For defendant's argument to prevail, he has to establish that the court had a duty to inform him of his Fifth Amendment right not to incriminate himself. This Circuit has held that a trial judge has the discretion to warn a witness, thus, this court must review[*25] the trial court's failure to give this warning for an abuse of discretion. See United States v. Arthur, 949 F.2d 211, 215-16 (6th Cir. 1991). We find that the trial judge did not abuse his discretion by failing to warn the defendant that his testimony could be used against him at his trial. In Arthur, this Circuit reversed a conviction on the grounds that the trial judge had abused his discretion by actively encouraging a witness to invoke his Fifth Amendment rights. Id. at 216. A trial judge has to balance the rights of the defendant against the rights of the witnesses. We believe that the judge may give greater weight to the rights of the defendant in the matter before the court even though the witness may be a defendant in another matter. Accepting that the court must consider the co-conspirator's right to a fair trial, we do not think that the district court judge violated the defendant's Fifth and Sixth Amendment rights to a fair trial by failing to warn him that his testimony could be used against him.

7. 18 U.S.C. § 201(c)(2)

Defendants Pruitt and Celester Degroat claim that the trial court erred in permitting[*26] the testimony of witnesses Beaver and Irvin because this testimony was obtained in violation of 18 U.S.C. § 201(c)(2) which prohibits the giving of anything of value in order to procure a witness' testimony.

Even if the defendants have not procedurally defaulted this claim by failing to bring a motion to suppress the witnesses' testimony prior to trial, the claim has no merit. In United States v. Ware, 161 F.3d 414, 419-21 (6th Cir. 1998), cert. denied, 526 U.S. 1045, 119 S. Ct. 1348, 143 L. Ed. 2d 511 (1999), this Circuit held that 18. U.S.C. § 201(c)(2) does not apply to prosecuting attorneys offering leniency in sentencing. The court also stated that even if this statute applied to prosecuting attorneys, the exclusionary rule does not apply to the testimony of witnesses who were offered lighter sentences in exchange for their testimony. Id. Based on this decision, we deny the defendants' claim.

8. Evidentiary Rulings

Defendants Pruitt and Celester Degroat contend that the trial court erred in making certain evidentiary decisions. Defendant Pruitt argues that the introduction of defendant's mug shots into evidence[*27] was more prejudicial than probative. Defendant Pruitt defaulted this claim because he did not object to the evidence at trial; however, defendant Pruitt's brief incorporates other defendant's arguments and defendant Celester Degroat did object at trial and has raised this issue on appeal. Defendant Celester Degroat argues that the district court erred in permitting the introduction of prejudicial photos and in denying his request to introduce into evidence a rap song. This court reviews a trial court's evidentiary decisions for an abuse of discretion. See Layne, 192 F.3d at 573.

We find that the trial court did not abuse its discretion in admitting the mug shot photo of defendant Pruitt. This photo was used by the prosecution to aid its witnesses in identifying the defendant. Because it was not unreasonable for the court

to infer that the defendant's appearance in the courtroom differed significantly from his appearance during the time of the conspiracy this evidence's probative value outweighs its prejudicial effect. See United States v. Padin, 787 F.2d 1071, 1079 (6th Cir. 1986) ("When a defendant appears at trial dressed in his Sunday best the[*28] prosecutor is entitled to show his appearance when arrested.")

The district court also did not abuse its discretion in accepting into evidence the "gang" photos. Defendant Celester Degroat directs this court to consider its unpublished decision in United States v. Hendrix, 1995 U.S. App. LEXIS 8676, No. 94-1404, 1995 WL 218472 (6th Cir. Apr. 12, 1995), in reviewing this claim. In Hendrix, the court held that the use of gang photos was so prejudicial that the defendant's conviction had to be reversed. See id. at *3. This case differs significantly from Hendrix because it involves a gang conspiracy. In Hendrix, the defendant was being tried for possession of cocaine, with intent to distribute. The court believed that the introduction of gang evidence played on the fears of the jury and was intended to show the defendant's proclivity for engaging in bad acts. See id. at *2. In this case, the central issue was the existence of a conspiracy and evidence about the existence of a gang was probative on that issue. Because this evidence was relevant and more probative than prejudicial the district court did not abuse its discretion in admitting it into evidence.

Defendant Celester[*29] Degroat's argument that the district court should have permitted the introduction of his rap song also is not persuasive. The rap song was hearsay as it was being offered for the truth of the matter asserted. See Fed. R. Evid. 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing,

offered in evidence to prove the truth of the matter asserted."). The song contained lyrics that the 4-KP gang was a music group who did not do drugs and would not participate in violence. Defendant contends that the trial court admitted prosecution evidence that was hearsay; therefore, the court erred in refusing to admit this evidence. Even if defendant's contention that the court allowed the prosecutor to present hearsay evidence is accurate, it is not grounds for finding that the district court abused its discretion in refusing to admit this evidence. In addition, the court found that a defense witness could testify to the contents of the song and that the introduction of the tape would be cumulative. Because the information on the tapes was permitted into evidence through the testimony of a witness the defendant cannot demonstrate that he[*30] was prejudiced by the court's refusal to admit this evidence.

9. Sentencing

All defendants, except Celester DeGroat, appeal their sentences. Defendants' primary claim of error is that the district court improperly calculated the drug amounts attributable to each defendant. Defendant Lemont Nash raises an additional claim that the district court erred in calculating his criminal history. Defendant Vennis Liles's claim of error about the drug amount differs from the other defendants in that he challenges the district court's determination of relevant conduct. In addition, he raises two other claims of error. He contends that the trial court improperly enhanced his sentence for possession of a dangerous weapon. He also argues that the district court erred in finding that he was an organizer or leader of the conspiracy.

This court reviews a district court's factual findings as to

the quantity of controlled substance for which a defendant is responsible for clear error. See United States v. Brannon, 7 F.3d 516, 520 (6th Cir. 1993). "The government bears the burden of proving, by a preponderance of the evidence, that the trial court should attribute a particular quantity[*31] of drugs to a defendant." Layne, 192 F.3d at 578. Defendants' main argument in support of their contention that the district court erred in calculating their drug amount is that the evidence upon which the trial judge based his findings was not credible. They contend that the witnesses who testified at trial and before the grand jury were not credible because they were convicted drug offenders and addicts. We believe that the district court's finding that this evidence was credible is not clear error.

a. Witness Credibility

The defendants[7] challenge the drug quantities attributed to them on the basis that the evidence upon which the district court relied is unreliable. The district court's determinations were based on the amounts identified in each individual defendant's PSI report. Defendants contend that the PSI reports were incorrect in that they inappropriately relied on the testimony of witnesses Beaver, Irvin, Foote, and Neal. Witness Beaver and Irvin had been convicted of serious drug charges and were cooperating with the prosecutor in an attempt to reduce their sentences. Witnesses Foote and Neal were recovering drug addicts. The testimony of these[*32] witnesses relied on by the PSI reports occurred either in their

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7. This discussion excludes defendant Vennis Liles' challenge which is discussed infra.

grand jury testimony or at the trial of three of the co-conspirators. While there are some inconsistencies in their testimony the district court judge had the opportunity to evaluate their credibility. We see no basis on which to find the district court's decision clearly erroneous.

b. Lemont Nash

Defendant Lemont Nash appeals his sentence on the grounds that the court improperly calculated his criminal history. The PSI report gave defendant one point for his conviction for possession of open intoxicants and one point for his conviction for transporting open intoxicants, resulting in a criminal history category of two. Defendant contends that these convictions should not have been included in his criminal history category pursuant to § 4A1.2(c). Section 4A1.2(c) sets forth those misdemeanor sentences which should be counted and excluded when calculating[*33] a defendant's criminal history. Neither of the defendant's convictions are directly referenced in this section. The defendant contends that these convictions should be treated like public intoxication which is never counted. U.S.S.G. § 4A1.2(c)(2). A conviction that falls into the category of included misdemeanor sentences should be counted only if the sentence for the conviction was for a term of probation of one year or a term of imprisonment of thirty days or if the conviction is similar to the instant offense. U.S.S.G. § 4A1.2(c)(1). Because neither of these convictions resulted in any sentence of imprisonment or probation the district judge must have determined that these convictions were similar to the offense of distributing drugs.

Although we think the district court may have been wrong in making this determination, we do not think it is

plain error. The defendant did not object to the PSI report containing the criminal history at the sentencing hearing; thus, he has waived his right to appeal his sentence on this grounds. See also United States v. Barajas-Nunez, 91 F.3d 826, 830 (6th Cir. 1996) ("Generally, a failure to object at sentencing forfeits any[*34] challenge to the sentence on appeal."). An appellate court, however, may review a sentence for plain error. See United States v. Koeberlein, 161 F.3d 946, 949 (6th Cir. 1998) ("Where, as here, a criminal defendant has failed to object below, he or she must demonstrate that the error was plain as defined by Fed.R.Crim.P. 52(b) before we may exercise our discretion to correct the error.). "To establish plain error, a defendant must show (1) that an error occurred in the district court; (2) that the error was plain, i.e., obvious or clear; (3) that the error affected defendant's substantial rights; and (4) that this adverse impact seriously affected the fairness, integrity or public reputation of the judicial proceedings." Id. In calculating the defendant's criminal history, the district court was required to make a determination of whether the defendant's convictions were similar to his instant offense. While the guidelines provided some assistance, it is not obvious and clear that these offenses were not similar to the instant offense. [8] Because it was not plain error for the district court to find that these two convictions were similar to distribution of drugs[*35] we must deny defendant's request for relief.

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8. We disagree with the dissent's contention that the view of this Circuit on this issue is clear. The case cited in the dissent is an unpublished decision and not binding. See 6th Cir. IOP 206. We do not believe it was plain error for the district court judge not to know of this opinion.

c. Defendant Vennis Liles

Defendant Liles challenges the district court's findings of the appropriate drug quantity on the grounds that the trial judge improperly considered conduct that was not relevant. In addition to this claim, he raises two other claims of error. He contends that the district court was clearly erroneous in finding that he was a leader of the organization. He also argues that the district court erred in enhancing his sentence for possession of a dangerous weapon. We find that the district court did not err in considering defendant Liles' drug activities as relevant conduct or in enhancing his sentence.

Defendant contends that the drug amounts attributed[*36] to him in the PSI report because of his 1993-94 purchases are not relevant conduct and cannot be utilized in determining his sentence. Defendant argues that for these activities to be relevant conduct the prosecution must show that they were part of the same course of conduct or common scheme or plan. U.S.S.G. § IB1.3, commentary, applic. n.9. We do not believe the district court's factual findings on this issue are clearly erroneous. Witness Foote testified that she began purchasing crack cocaine in 1993-1994 and continued until her arrest in September of 1996. During that time she purchased from the defendant more than fifty times. This evidence was sufficient to demonstrate that the defendant engaged in a course of conduct beginning in 1993 and continuing into 1996. In addition, witnesses Beaver and Irvin testified that defendant was a leader of this organization. The court was not clearly erroneous in finding that this evidence demonstrated that the 1993-1994 purchases were part of a common course of conduct in furtherance of the conspiracy of which the defendant was one of the leaders.

Like the other defendants, defendant Liles contests the district court judge's use of certain[*37] witnesses' testimony in making his sentencing determination, and like the claims of the other defendants, his claims also must fail. There was evidence introduced at trial supporting both sentence enhancements. Witnesses Beaver and Irvin testified at trial that Liles was the leader of the older members of the 4-KP gang. Witness Beaver identified two individuals over whom defendant Liles executed control while witness Irvin identified four additional individuals over whom Liles executed control. Section 3B1.1(a) of the sentencing guidelines directs a sentencing judge to increase the defendant's offense level "if the defendant was an organizer or leader of criminal activity that involved five or more participants." U.S.S.G. § 3B1.1(a) (1998). We find that the evidence of the defendant's leadership role in the 4-KP gang was sufficient to support the district court's enhancement of the defendant's sentence.

Defendant Liles challenges not only the evidence supporting the district court's decision to enhance his sentence for possession of a dangerous weapon, but the district court's conclusion that his possession of a weapon while engaging in conduct relevant to his conviction is a legitimate[*38] grounds on which to enhance his sentence. Section 2D1.1(b)(1) provides that a district court should enhance a defendant's sentence "if a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1) (1998). This provision of the sentencing guidelines was amended in 1991 to delete the language "during commission of the offense." Appendix C of the sentencing guidelines states that this amendment was intended to clarify, that the relevant conduct provision, § 1B1.3(a)(2), applies to adjustments in § 2D1.1(b)(1). U.S.S.G. App. C, amend. 394 (1998). Accepting that a defendant's sentence can be enhanced where the

possession of the weapon occurred during conduct relevant to the offense, we find that the district court did not err in enhancing the defendant's sentence. Witness Beaver testified that all members of the gang carried guns and that there were guns located at different locations around Fourth and Kirk of which all gang members were aware. Witness Foote, who stated that she had purchased drugs from the defendant numerous times, testified that all of the conspirators carried weapons when conducting drug transactions. In this case, the testimony supported a finding[*39] that the defendant possessed a weapon during the sales of drugs found to be relevant conduct. Because the district court's finding that this testimony is credible is not clearly erroneous, we affirm the district court's factual findings.

III. Conclusion

For the foregoing reasons, the district court's judgment and sentences are affirmed except for defendant Denise Degroat's conviction under Count 6 of the superseding indictment in Case No. 96- 20004 for a violation of 18 U.S.C. § 2232 (b). We remand this count to the district court for a new trial.

CONCUR BY: MERRITT (In Part)

DISSENT BY: MERRITT (In Part)

DISSENT: MERRITT, Circuit Judge, concurring in part and dissenting in part. With respect to the additional criminal history point assessed against Lamont Nash for his conviction under Michigan law for driving with open intoxicants, our opinion in United States v. Scott, 1 F.3d 1243 (1993), held that a defendant should not receive criminal history points for

conviction of Michigan's open intoxicant law. The law to this effect in our Circuit appears to be plain and established by a clear holding. Because Nash was sentenced to 120 months – the top[*40] of the range – a reduction in his criminal history points would affect his sentence by giving him a maximum of 108 months – a year less than the sentence he received. I would remand the sentence in Nash's case and require that the district court resentence Nash.

Beyond that point I am concerned that there may have been Fifth and Sixth Amendment violations when Celester DeGroat was brought from his jail cell without his lawyer over to District Judge Cleland's court and intensely cross-examined about the crime for which he was about to be tried. It seems to me that there is a severe Sixth Amendment problem here, and I would remand the case to the district court for a full evidentiary hearing and findings of fact and conclusions with respect to this unfortunate incident. The court permitted DeGroat to be examined without his lawyer and without advising him that he had a right to have his lawyer present. It appears to me that the testimony which he gave at that hearing may very well have been prejudicial to him at his later trial.

Otherwise, I concur in Judge Kennedy's opinion for the court.

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Dated June 12, 2000

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Nos. 98-1012 98-1015
v.	)	
CELESTER R. DEGROAT, JR,	)	ORDER
Defendants-Appellants.	)	

Filed June 12, 2000

BEFORE: MERRITT, KENNEDY and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges on this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

APPENDIX C

EXCERPT OF TORRYE GILBERT SENTENCING HEARING OF THE UNITED STATES COURT

Hearing Date July 15, 1997

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA No. 966-20045
EXCERPT

Plaintiff,

-vs-

TORRYE GILBERT,

Defendant.

Excerpt of proceedings had and testimony taken in the above-entitled matter before the Honorable Robert H. Cleland, United States District Judge, at Bay City, Michigan, on the 15th day of July, 1997.

APPEARANCES:

SAUL GREEN UNITED STATES ATTORNEY

BY: MICHAEL HLUCHANIUK, AUSA,

Appearing on behalf of the Government.

DAVID MYERS, Esq.,

Appearing on behalf of the Defendant. (The following is an excerpt:)

THE COURT: All right, counsel. Mr. Myers, what do you wish to do?

MR. MYERS: Your Honor, I wish to call Celester DeGroat.

THE COURT: Is this he?

MARSHAL: Yes.

THE COURT: You've been called to the witness stand, sir, raise your right hand.

CELESTER DeGROAT SWORN,

DIRECT EXAMINATION

By Mr. Myers:

Q Mr. DeGroat, I understand you're a defendant in the proceedings presently pending before this court on cocaine conspiracy charges; is that true?

A Yes, sir.

Q You have not entered a plea yet, you're going to trial?

A Yes, sir.

Q You're represented by an attorney in that case?

A Yes, sir.

Q That Mr. Street?

A Yes, sir.

Q Do you understand I have had a subpoena served on you to testify in regard to Torrye Gilbert's sentence hearing?

A Yes, sir.

Q And you have had an opportunity to discuss that with your attorney, Mr. Street?

A No, I haven't talked to him.

Q Is it your understanding he recommends you not testify?

A I don't know.

Q Do you understand you would have the right to remain silent and not testify, but if you wished to waive that right you can testify regarding your dealings or lack of dealings with Torrye Gilbert?

A Yes.

Q Do you wish to testify or not testify?

A Yes.

Q Yes, you wish to testify?

A Yes, on behalf of Gilbert.

Q Do you know a person by the name of Eugene Beaver?

A I don't know him. I don't know him, I heard his name before.

Q Well, we heard a person named Eugene Beaver testify this morning that he saw you front Torrye Gilbert two ounces of crack cocaine and sell Torrye Gilbert two ounces of crack cocaine in February of 1993, is that true?

A No, sir.

Mr. Meyers: Thank you. I have no further questions.

THE COURT: Mr. Hluchaniuk?

MR. HLUCHANIUK: Your Honor, perhaps some preliminary indication from the court on the scope of cross examination would be appropriate. I believe that I'm entitled to inquire of this witness anything relating to his involvement with the defendant, Mr. Beaver, or the general circumstances surrounding those events.

THE COURT: I think that's a fair recitation of proper scope, those matters were raised by Mr. Myers in his brief questioning.

CROSS EXAMINATION

By Mr. Hluchaniuk:

Q Mr. DeGroat, were you selling drugs in Saginaw in 1993?

A No, sir.

Q Never sold any drugs at all?

A No, sir.

Q How about 1994?

A I was in college, sir.

Q Well, that doesn't mean you weren't selling drugs.

A I was in school, I didn't have time to do anything

Q So you were so busy in school you didn't have time to sell drugs?

A Also I was on probation too.

Q So the answer is no you Weren't selling drugs in 19947

A '93,'94 '95 '96 and '97. I didn't sell any drugs, sir.

Q Ail right. So in 1996 when there was a search conducted at your house and there were drugs found there; whose drugs were those?

A I don't know, sir, I think one of the officers brought it in from my understanding.

Q So the police planted the drugs in your house?

A From what I understand.

Q What's your understanding based on?

A I ain't had no drugs. They came in -- I wasn't really · resident there, that was my grandmother's house. I stayed --

Q You were living there?

A I stayed with my aunt.

Q So the house that was searched where the drugs were found was not your residence?

A No, sir.

Q How often were you there?

A I would get like a couple of outfits there,

you know, wearing outfits, then leave. I didn't stay there too often at my grandmother's house.

A On 9th, I have another grandmother I was staying at on 14th also.

Q So the 9th Street house you didn't stay at?

A No, sir.

Q Where did you spend most of your nights.

A Either at 1210 Aston -- before that it was 1715 Farmall. I lived with Roberta White, I lived with my girlfriend, she moved to 1210 Aston.

Q So the drugs found at the house where you were in

October when you were arrested, the police planted there?

A I don't know, I didn't have no drugs before they came or after, I didn't have any drugs.

Q So you never sold any drugs at all in your whole life?

A I didn't have no drugs.

Q My question was you have never sold any drugs in your whole life?

A No, sir.

Q Is that a yes or a no?

A No.

Q You don't know Eugene Beaver?

A I heard of him but I never -- you know, I don't know him.

Q You didn't live next to him in California when you

lived out there?

A No, I stayed in Los Angeles, California. I didn't stay out there. I moved to Saginaw in '88 when I was, like, 15, 16. I been staying in Saginaw since '88 -- I think it was May 12, 1988. Before that I stayed in Saginaw in '86 and '84; so I mainly stayed in Saginaw all my life.

Q So when you -- but you did live in California for a period of time?

A Maybe when I was like -- till I was, like, ten, ten or eleven, then I moved to Saginaw in '84.

Q So you were ten or eleven in '84 and that's when you moved to Saginaw?

A Then I moved back to -- I left and I moved back to Saginaw when I was, like, 13 or 14. I went to Arthur Eddie Junior High and Saginaw High-school.

Q So you have been to Saginaw since you've been 13 years?

A I went back to California for, like, a year or two then I moved back here. I went to Saginaw High.

Q When you were in California you didn't live next to Eugene Beaver?

A No, sir.

Q So if he said that he knew you and lived next door to you in California, that couldn't have been true?

A He said a lot of things to get his testimony cut, sir. With respect to this particular question, he didn't

Q With respect to this particular question, he didn't live next door to you in California?

A No.

Q Never?

A No.

Q And you never went out to California in January of

A I was on probation at the time, sir. I couldn't - I couldn't leave out of town, I was on probation from 1991 to 1995.

Q Probation for what?

A A gun charge.

Q Is that the only felony you've been convicted of?

A And felonious assault.

Q So two felonies you've been convicted of.

A I never been convicted of no drugs or anything like

Q You deny you went to California in 1993?

A I had got shot in, like, October -- November 1, 1992. I stayed in the hospital for, like, 22 days. I had got shot in the abdomen, and my aorta had slit. I had to keep going back and forth to the

doctor because I was -- when I got a shot, I was at work. I got shot on the job.

Q That was in 1992?

A My problems carried all the way through, like, '93,

Q I had gotten real weak. I was on probation also so I couldn't leave out of town, my probation officer had all the papers and everything.

Q So you never bought any drugs or acquired any drugs from Eugene Beaver?

A No, sir.

Q Never at any time?

A No, sir.

Q Never sold any drugs in Saginaw?

A No, sir.

Q You have to answer yes or no.

A No, sir.

Q Were you a member of the 4KP gang?

A 4KP, you know, that's not a gang that I know of. I think that's just the vicinity, just two cross streets, 4th goes this way and Kirk goes

that way. It's just a location, it's not a gang that I know of, sir.

Q So if you had a hat in your house that said 4KP on it, what did that mean?

A I didn't have a hat that said 4KP on it, sir.

Q Did you have a hat in your house that said something like that on?

A Said 4KP? It didn't say that, sir.

Q What did it say on it?

A It said 4K Fools.

Q 4K?

A Fools, fooz or something like that.

Q That's what the hat said?

A Yes.

Q What was the significance of that?

A You know it's these little guys that be over there, they be rapping, you know, it's a little rap group; they be rapping. They had a little tape and everything, singing rap songs and all that. That's what they call themselves.

Q So it was just a musical group that had a -- that's what the hat was for?

A They had a little tape, you know, little tape. They had the hats, you know. It wasn't no - ain't no 4KP and all that. I don't understand all that, it's just - 4th and Kirk, that's just 4th goes this way and Kirk goes that way. They meet up.

Q A lot of drugs were sold at that intersection, weren't they?

A I don't know, you know, what went on at that street there before. I don't know.

Q During 1993, '94, '95 and '96 you were down there a lot, weren't you?

A In '93 and '94 -- I was in school all them years you said. I been going to Delta College since 1994, first part of '94. I've been going to Delta College ever since last -- all I need is, like, six credits to graduate from school. I kept a B grade average.

Q How many hours a week did you spend in class?

A I had a full load every time, sometimes I had an overload so I had, like -- sometimes I had 14 credit hours, sometimes 12 credit hours. So I used to go to school sometimes from Monday through Saturday. Sometimes I went, like, on the week nights. Week days.

Q So you didn't hang around at 4th and Kirk?

A I didn't hang -- it wasn't like I was just hanging, you knew. My girlfriend stayed over there, my mother stayed over there, I have a child over there. It wasn't like I was just hanging out, you know, I was over there for my child. I wasn't -- you know.

Q You never went there to sell drugs?

A I wasn't selling drugs, sir.

Q Never sold drugs to any undercover officers in 1996?

A No. Your Honor, they said -- I mean, sir, they said I sold -- I had supposedly sold some drugs to undercover and I was supposed to be on videotape, but my lawyer watched the videotape, I

wasn't on there at all. I wasn't on the videotape like you all said I was.

Q So it couldn't have been you that sold those drugs to the undercover officer?

A I didn't do it.

Q Okay.

A You all said I was on the videotape, and when we keep watching the videotape I'm not on the videotape.

Q Are you a friend of Derrick Williams?

A Who?

Q Derrick Williams.

A I know of Derrick Williams.

Q But he's not a friend of yours?

A I know him.

Q Well do you consider him a friend?

A We had an argument and stuff like that but, you know, I never -- you know, we wasn't friends like best friends, you know. I seen him around and all that.

Q How before James Louis?

A I met James. We used to play basketball, he was playing on the younger team than I did at 17.

Q That's the only connection you ever had with him?

A What other connection could I have with him, supposedly?

Q Selling drugs with him.

A I wasn't selling no drugs with nobody, sir.

Q What did you do for a living in '93, '94, '95 and '96; how did you support yourself?

A Like I said, I was on the job when I got shot and I had kept -- when I got shot I was getting workmen's compensation until, like, a year and e half. That's when I started school. I got workmen's compensation for -- I don't exactly know, maybe 18 months or something like that. You know, I was critically wounded, I had my back -- you know, I still have problems with my back. I was at work when I got shot.

Q Why were you shot?

A I don't know, I was at work, you know,

someone just --

Q Where did you work?

A At Citywide Initiative, Saginaw. I was a supervisor.

Q So somebody just walked into where you were working and shot you?

A They had a big dance for teen-agers, and a guy snuck a gun in there and they started shooting. I was trying to get out of the way, they shot me by accident. I had -- that was - I was working two jobs, I was working at the CAC also, that's the seasonal job.

Then when I got shot in, I think it was October 31st, I had stayed in the hospital until, like, November, like, 22nd or something. And I had to start going -- I had to keep going to the doctor back and forth and, you know, I was just getting workmen's compensation, like, $146 a week.

Q What was the name of the doctor you were seeing at that time?

A It was -- first I had to go to a doctor that

the job recommended, he was in Flint. Then I had my own doctor, he stayed in Southfield, a doctor in Southfield. They have all the medical records.

Q How often were you seeing a doctor in 1996?

A 1996? I was in school in '96.

Q So you had stopped treating with the doctor by then?

A After I had got rehabilitated from the surgery and everything, I had the workmen's compensation and all that and I just got in school after that and I been going to school ever since. I had, like, 65 credits in school. I been going to school.

Q In 1993 were you seeing a doctor for this shooting incident?

A Yes.

Q What doctor were you seeing then?

A I went to the doctor that the job recommended me to go see, his office was in Flint somewhere.

Q But you don't recall his name?

A No, that was in '93, sir.

Q How often did you see that doctor?

A I had to go back and get check-ups from the bullet wound itself, see if it had infected anything because I have a plastic cap on my aorta.

Q How often were you seeing the doctor?

A Maybe -- I saw the doctor maybe, like, twice after I got out. That was like exactly after I got out. I went to the doctor probably two or three more times that year.

Q So you went to the doctor two or three times in 1993?

A Maybe four times, three or four.

Q It was always the same doctor, the one you went to in Flint?

A No, I went to one in the Royal Oak-Southfield area. Royal Oak-Southfield area.

Q So where were you staying again in October of 1996, where was your primary residence?

A 1715 Farwell.

Q Who else lived at that house?

A Roberta White.

Q What was your relationship to her?

A That's my stepmother.

Q Did you stay at other locations at that time?

A No, sir.

Q Did you have a girlfriend you stayed with at any point in time?

A Yeah, I had a girlfriend.

Q Who was your girlfriend?

A Brewer, Alfreda Brewer.

Q Did you ever spend the night with her?

A We wasn't getting along too good, you know, in '96. I stayed over there a couple times, not often though.

Q So this residence on Farwell was --

A That was my -- that was in the projects, Daniel Heights.

Q You would spend how many nights a week

there?

A Probably four days out of the week.

Q Where did you spend the other three?

A Either at another -- like a female's house or over my sister's house. My sister Cathy Hayes, she stayed on Bellvue.

Q So your grandmother's house on 9th Street, you didn't spend any nights there?

A I stayed there probably, like, once -- once out of the week, about two times out of the month.

Q But you kept clothes there?

A Like jogging pants, some jogging pants and stuff like that. Not the majority of my clothes.

Q You had another grandmother?

A Yes, 524 South 14th.

Q Did you ever spend any nights there?

A Yes, I had I stayed over there.

Q How frequently would you stay over there?

A When she would go out of town and stuff, you know, she would be going to Ohio a lot to see a relative so I would just stay over there and watch

the house for her.

Q And the fact that you were at this location on 9th Street when the police came in was just a coincidence?

A I had got -- I had got a cut on my arm, I had a lot of cuts on my arm, my dad was supposed to take me back to the hospital because I had another cut and I needed some antibiotics so I was waiting on him to come and get me and they just came over there.

Q So to summarize your testimony, you never sold any drugs between 1993 and 1996.

A I wasn't selling no drugs, sir, I was in school.

Q All right. In fact, you never sold any drugs in your whole life?

A I didn't sell any drugs, sir.

Q In your whole life?

A I didn't sell no drugs, I didn't sell any drugs.

Q I'm just trying to confirm that, you never sold any drugs in your whole life?

A I didn't sell any drugs, sir.

Q so this charge against you is just a big mistake?

A It's just seems like everybody trying -- I don't know what it is, it's just a lot of accusations, sir, that I was here and I was down there. If you go -- if you check the days and all that, I been at school every day out of the week. I got a 3.0, that's a B plus grade. I'm not the person that they claim I am.

Q Never sold any drugs to a woman named Ashley Neal?

A I don't know no Ashley Neal.

Q How about Jennifer Foote, do you know her?

A I don't know Jennifer Foote.

Q When was the last time you were in California?

A August 8, 1996.

Q What were you doing there at that time?

A My mother stays there, my sister stayed there.

Q Were you ever in California in 19937

A No, sir.

Q 1994?

A I was on probation, sir.

Q Okay. How about '94?

A I was on probation also.

Q So that means you weren't there?

A (Shakes head.)

Q In 1995 were you ever there?

A Soon's I got off probation in 1995, I took my daughter to see my mother there.

Q When was it in 1995 you went there?

A It was me, my father and my daughter; that was probably July when my father got off work.

Q Did you ever go to California with Derrick Williams?

A No, sir.

Q So you never would have had your photograph

taken in California with Derrick Williams?

A What photograph, sir?

Q If you -- you were never there with Derrick Williams?

A No sir.

MR. HLUCHANIUK: No further questions.

THE COURT: Anything else, Mr. Myers?

MR. MYERS: I have no further questions.

A Yes, sir.

THE COURT: Mr. DeGroat?

THE COURT: you were in California in 1993.

A Yes, sir.

THE COURT: Your answer each time you were asked

that was: I was on probation. Now, if you had been asked the question were you on probation in 1993, I can understand you giving that answer.

A Yes, sir.

THE COURT: But you weren't asked that question.

You were asked: Did you go to California in 19937

What's the answer to that question?

A No, I didn't, sir.

THE COURT: Thank you. I thought that was what you intended, but I wasn't quite sure about what the answer was.

A I'm sorry, sir.

THE COURT: Your answer was no, you weren't in California in 1993. No, you were not in California in 1994; am I correct?

A Yes, sir.

THE COURT: Thank you sir. That's all. You can step down.

(Excerpt concluded.)

I, Charlene McLoughlin, United States Court reporter, do hereby certify that I recorded in shorthand the proceedings had and testimony taken in the above entitled matter and that the foregoing and attached pages are a full, true and correct transcript of my shorthand notes then and there taken.

I further certify that all proceedings at sidebar were held with a noise generator engaged in the jury box.

CHARLENE McLOUGHLIN ,

U.S. COURT REPORTER